SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Rodrigue v. Snarby*, 2023 NSSM 13

Date: 20230221
Docket: SCBW 507589
Registry: Bridgewater

Between:

Adele Rodrigue

Claimant

-and-

Kristopher Snarby, Christine Cooke-Nickerson, Stephen Nickerson, Stephen Hall and Christopher Folk

Defendant

Reasons for Decision and Order

Adjudicator: Eric K. Slone

Heard: April 8, April 22, June 3, June 17, June 28, September 14, September 21 and October 4, 2022 via Zoom

Appearances: For the Claimant: self-represented

For the Defendant Stephen Hall: self-represented

For the Defendant Kristopher Snarby: Noah Entwisle, counsel

For the Defendants Christine Cooke-Nickerson and Stephen Nickerson: Joshua Bryson, counsel

For the Defendant Christopher Folk: Ashley Hamp-Gonsalves, counsel

BY THE COURT:

Introduction

[1] In June 2019 the Claimant, Adele Rodrigue, who had recently moved from Ontario to Nova Scotia, bought a house at 356 Shore Rd. in Mersey Point, a few kilometres outside of Liverpool on the South Shore of Nova Scotia. The price she paid for the house was $134,500.00.

[2] The sellers were a married couple, Christine Cooke-Nickerson and Stephen Nickerson, who had owned the property for about eight years.

[3] The Claimant used the services of a local real estate agent, Kristopher Snarby, who was also the listing agent for the subject property.

[4] The Claimant had a home inspection done by a professional home inspector, Stephen Hall.

[5] The legal work for the transaction was handled by Christopher Folk of "Folk Law" in Liverpool. That law firm represented both sides in the transaction.

[6] The Claimant has come to believe that she should not have bought this property because of issues that have mostly come to light since the closing, and other issues that she experienced even before closing. She believes that the vendors misrepresented the state of property in the Property Disclosure Statement that they provided. And she believes that each of the professional Defendants failed her in some way. She feels that she was bullied into closing the transaction by her agent and her lawyer's office. Essentially, she has sued everyone who, she says, misled her or failed to help her look after her legal interests. While her damage claim is naturally limited to the $25,000.00 monetary limit of this court, she says that she has experienced actual damages that exceed $134,000.00, which is an extraordinary proposition in the context of a home that initially cost her $134,500.00.

[7] Suing this many people, three of whom are professionals, has had consequences. This trial took eight full or half days to hear. Three of the Defendants (or sets of Defendants) were represented by experienced litigation counsel, while the Claimant herself and one of the Defendants (the home inspector, Mr. Hall) represented themselves. Each party filed a book of exhibits of varying thickness, and in some cases written closing submissions and/or books of authorities. All of them testified and some of them called additional witnesses.

[8] At the risk of sounding patronizing, I tip my hat to the Claimant who soldiered on bravely despite clearly being surprised at, and challenged by the demands of the process and the obstacles that she faced in trying to put forward her claims. She clearly did not appreciate that a matter in Small Claims Court could be so complex and take up so much time.

[9] In the end there is little doubt in my mind that this was an unfortunate purchase for Ms. Rodrigue. And I understand how she might feel that she was not as well served by the professionals who provided a service to her as she might have been. But as I will elaborate upon in these reasons, there is a difference between merely ineffective or indifferent service, and actionable negligence or breach of contract.

[10] In the result, on a close analysis I cannot find any legal liability attaching to any of the Defendants and the claim will be dismissed as against all of them.

The evidence

[11] As mentioned, there was a great deal of documentary and *viva voce* testimony. It is impractical to recite all or even most of it. In writing this decision I have reviewed my almost 100 pages of notes and have looked at hundreds of documents. I will recite evidence where I believe it assists in understanding the case and my ultimate decision.

[12] Also, because there are many parties involved it is not possible to stick to a purely chronological narrative. Sometimes it will be better to digress from the chronology and look at the facts concerning a discrete issue or a particular party.

Real Estate Agent Kristopher Snarby

[13] The Claimant's first point of contact was with her real estate agent. Kristopher Snarby is a former schoolteacher who switched careers and became a real estate agent in about 2008. He operates through Exit Realty in Liverpool and is active throughout the South Shore of Nova Scotia. He believes he enjoys a good reputation in his profession and in the community, and there is no evidence to the contrary.

[14] The Claimant had been working with Mr. Snarby off and on for about a year, looking at various properties. Two potential purchases actually resulted in purchase agreements but fell through because in one instance Ms. Rodrigue was

not happy with the results of the inspection, and in the other case she had a problem obtaining financing.

[15] Just as one of those purchases was falling through, in May 2019, the subject property at 356 Shore Rd. in Mercy Point came on the market, listed for $139,900.00. It was neither old nor new, having been built in or about 1965. Mr. Snarby happened to be the listing agent, which he had not been on the previous properties that the Claimant had looked at. One of the consequences was that Mr. Snarby had dual allegiances, and he told her so, though I am not sure that Ms. Rodrigue acted any differently than she had in previous attempted purchases where he was her agent only. Eventually he would have Ms. Rodrigue sign a document confirming that she understood this relationship, but it is not clear that she ever fully grasped that Mr. Snarby's duty to the sellers was paramount, and that she could not assume that he was looking out for her interests only.

[16] The listing cut described the property as follows:

> Neat as a pin, two bedroom 1.5 bathroom bungalow in Mercy Point. This home is perfect for someone looking for a starter home, or someone wanting to downsize. Located just a short 2 km drive from the town of Liverpool, you have easy access to all of the amenities that Liverpool has to offer, while enjoying the benefit of county taxes. Featuring a combination of hardwood, laminate and ceramic floors, this home is perfect for someone to simplify with an easy to maintain, well-kept home in a great location! The kitchen/dining space opens into the bright and airy living room. There was also a half bathroom connected to the master bedroom, along with the full bathroom and the second bedroom as well. The private, fenced in backyard also houses a detached building, that is perfect for a separate recreation space, storage or for the workshop. Call today to book your viewing of this excellent home!

[17] As she began to consider this purchase, Ms. Rodrigue was in frequent contact via text with Mr. Snarby who, because he was the listing agent, had (in theory) more than the usual information about the property. In one of those texts Mr. Snarby told the claimant:

> Updated basement. (old one used to get some water) so they did work to basement, and drainage around the house etc.… No issues since. Big outbuilding, with wood stove etc., fenced in yard.

[18] The Claimant decided to look at the property and seriously considered making an offer. She formed the view that the property was slightly overpriced, and decided to make an offer of $122,000 as an opening bid.

[19] The Claimant explained to Mr. Snarby that she did not want a fixer-upper, but wanted something that was in already good condition. Mr. Snarby already knew from experience with a previous listing that the Claimant was not in a position to undertake significant renovation to a property.

[20] Mr. Snarby also conveyed to the Claimant that he somewhat knew the current owners of the property, Christine Cooke-Nickerson and Stephen Nickerson, and also knew that Ms. Cooke-Nickerson's father, Paul Cooke, was a contractor. The implication was that the home had been well maintained because there was a carpenter in the family. Mr. Snarby also mentioned that he had known the previous owner of the property, who he referred to as his “RCMP buddy,” who he might also consult for further information.

[21] Also, according to the Claimant, Mr. Snarby made a number of other verbal statements about the home. She says that he told her that the house used to flood, but that the sellers had remedied the situation by pouring a new concrete slab in the basement that was sloped to drain any water into the sump pit, and had a channel running along the outer edge that would catch any overflow and redirect it into the sump pit. Mr. Snarby also allegedly told Ms. Rodrigue that the sellers had dug around the home and put in drainage tiles as well as a French Drain to divert water away from the house. He also allegedly told her that the “whole basement” had been redone and was all new, except for the furnace. Ms. Rodrigue took this to mean that there was a new sump pump and hoses, new hot water tank etc.

[22] Mr. Snarby adamantly denied in his testimony ever saying that the sellers had done any work on the exterior drainage or had installed a French Drain. This is just one of many discrepancies between what the two of them say happened, or did not happen. Mr. Snarby’s testimony on this point is not entirely consistent with his texts.

[23] Eventually, after a couple of offers and counter-offers, an agreement of purchase and sale in the amount of $134,500 was entered into dated June 7, 2019. A closing date of July 19, 2019 was agreed to.

The home inspection

[24] The agreement of purchase and sale was, as is customary, conditional upon the purchaser having a satisfactory inspection. Ms. Rodrigue already had experience with the defendant, Stephen Hall, who had performed an inspection on one of the earlier properties she had looked at. It was on the basis of his report that she backed out of that transaction.

[25] For the subject property, the Claimant and Mr. Hall agreed on a verbal inspection that he would perform at half of his usual price, namely $250.00 plus HST. He informed her that if she later needed a written report, he would produce one upon payment of the other half of the fee. According to Mr. Snarby and Mr. Hall, they understood that the Claimant was tight financially and was looking for a way to save some money. She had recently spent $500.00 plus HST for a full inspection of a previous property that she gave up on, because of issues raised in the inspection report. Ms. Rodrigue denied that she initiated the discussion about saving money. I find as a fact that she was openly concerned about money at the time, and even if she did not initiate this conversation she embraced it fully.

[26] In retrospect, this was one of the worst decisions that the Claimant could have made and which I consider to be at the root of many of her problems. Mr. Hall later completed his report, though only for the purposes of this litigation. Had Ms. Rodrigue had this report in the palm of her hand back in June 2019, I seriously wonder whether the transaction would have proceeded. For the saving of a few hundred dollars, Ms. Rodrigue ended up with a disastrous outcome.

[27] Upon arriving at the property, Mr. Hall presented Ms. Rodrigue with a two-page agreement concerning the inspection. At the top of the page, in capital letters, it states:

> THIS AGREEMENT LIMITS THE LIABILITY OF THE HOME INSPECTION COMPANY. PLEASE READ CAREFULLY BEFORE SIGNING.

[28] It is not necessary to recite the entire agreement. But I quote a few sections:

> There are limitations to the scope of this inspection. It provides a general overview of the more obvious repairs that may be needed. The inspection is a one time nondestructive, visual observation of the systems of the property and how they work, or don't, together. It is not intended to be an exhaustive list of every repair required and is not a Code-based assessment. The inspector will use his knowledge and safe work practices to determine any areas that are unsafe … Certain conditions might not be apparent during a one-time visit and anything hidden behind storage or walls might not be apparent. The ultimate decision of what to repair or replace is yours. One homeowner may decide that certain conditions require repair or replacement, while another will not.
>
> The inspection is not a guarantee, warranty or an insurance policy with

regard to the fitness of the property.

> LIMIT OF LIABILITY/LIQUIDATED DAMAGES/INDEMNIFICATION
>
> The liability of the Home Inspector and the Home Inspection Company arising out of this Inspection and Report, for any cause of action whatsoever, whether in contract or in negligence, is limited to a refund of the fees that you have been charged for this inspection. The client agrees to indemnify and save the Inspector and the Company harmless from any claim arising out of the use of the report by any other person or persons.
>
> **I hereby acknowledge that I was aware of, and had the opportunity to review this agreement prior to the commencement of the inspection. Whether or not I exercise the right to review this agreement I hereby accept all the terms and conditions of this agreement.**

[29] The document was signed by Ms. Rodrigue on the date of the inspection, June 18, 2019. Because it was a verbal report, none of the limitations of liability that might be contained in the standard written report would apply in the situation. But it is hard to say that Ms. Rodrigue would not have been aware of Mr. Hall's precondition that the inspection would be undertaken with very limited liability on his part. In addition, she had signed an identical document recently in connection with another property so this was not the first time that she was aware of the limitation of liability.

[30] The extent of the enforceability (or not) of such a limitation of liability raises a legal question which I will touch on later on in these reasons.

[31] There is a considerable difference between Ms. Rodrigue's and Mr. Hall's versions of how this inspection proceeded. It is worth mentioning this at this point, because this also greatly impacts on credibility.

[32] According to Ms. Rodrigue, Mr. Hall went about his business doing the inspection while she largely sat in the living room and waited for him to complete it and report his findings to her. According to Mr. Hall, in his written statement which served as his evidence in chief:

> To the best of my recall the client followed me closely around except for the roof & attic void and was actively taking notes and asking questions throughout the inspection. The Realtor mostly remained out of the way and did not follow us closely around the house. At the end of the inspection the client and I stood in the front yard and I recapped the whole inspection. Again the client took notes.

[33] Mr. Hall stated that this was the only way that the verbal inspection report would work. With the exception of the areas that Ms. Rodriguez did not go in with him, such as the attic, he insisted that she was present throughout most of the inspection.

[34] Although I found Ms. Rodrigue to be generally sincere, I find it hard to believe that she would have sat around and waited for Mr. Hall to return to her with his verbal observations. One would have expected someone in Ms. Rodrigue's position to be curious and want to see with her own eyes the inner workings of the home she was contemplating purchasing. Overall, I found Mr. Hall to be credible, even if a bit defensive, and I am very doubtful that he would have agreed to a verbal inspection in the manner that Ms. Rodrigue described. It is, of course, possible that they are both partly correct and that Ms. Rodrigue did follow him around some of the time and that they are both exaggerating based on their own memories.

[35] Based on the results of the verbal inspection, there were a few issues flagged and Ms. Rodrigue was going to ask that these be rectified as a condition of continuing with the purchase. These issues were:

> Electrical issues, concerning reversed polarity in some outlets and the need for a GFI plug in the kitchen.
>
> An area of flashing in a section of the house above the kitchen/bathroom area needed to be added to avoid water penetration.
>
> A proper venting fan on the exterior of the house from the bathroom was to be added.
>
> Some additional screws were required to secure the Selkirk chimney in the outbuilding.

[36] It was specified in an amendment to the agreement of purchase and sale that the first three items would be completed by a qualified professional prior to closing.

[37] In his evidentiary statement Mr. Hall stated:

> The client seemed to understand the information provided and her main concerns to be addressed by the sellers appeared to be the electrical and the roof leakage. The client decided on the things she wanted the sellers to

> address and at the conclusion of my inspection the client went back inside and discussed that with her Realtor. I was not party to that discussion, until the commencement of these proceedings I had no idea what the claimant had asked for the sellers to correct. My main concerns would have been the furnace and electrical issues.

[38] The issue with the furnace seems to have taken on less significance as the sellers were providing Mr. Rodrigue with a newer furnace from another property, which she would have to arrange to be installed.

[39] I observe at this point that the items Mr. Rodrigue asked to be fixed were relatively minor issues easily and cheaply rectified. I find it somewhat concerning that Ms. Rodrigue focused on a few relatively inexpensive deficiencies, rather than on the state of the property concerning potentially major problems that might develop in a 50-plus year old property.

[40] Ms. Rodrigue emphasized many times during her evidence that she relied on statements by Mr. Snarby to the effect that the house was in great condition. She also faults Mr. Snarby for stating that the yard was fully fenced in, when clearly it was not. It was partially fenced. Ms. Rodrigue needed a fully fenced yard because she has dogs. She also claims that he misrepresented that the neighbours were tolerant of dogs, which they were not.

[41] While Mr. Snarby clearly overstated the case concerning the fence, Ms. Rodrigue was not misled. She walked the property and saw that one side was open and that further fencing would be needed in order to enclose the yard. She even got a quote for such work. Probably Ms. Rodrigue ought to have realized early on that Mr. Snarby was not a totally reliable source for information about the property.

[42] Following the inspection, Ms. Rodrigue advised Mr. Snarby of the items she wanted addressed as conditions of closing. She was particularly concerned with the electrical issues. Specifically, some of the outlets had reversed polarity, which is a shock hazard. Not to minimize the undesirability of such a situation, it is extremely simple to fix. What was possibly more concerning is the fact that it probably occurred because of an amateur electrician wiring in these receptacles.

[43] Though Ms. Rodrigue did not see a written report from Mr. Hall until recently, it is rife with comments about the amateurish nature of many of the visible repairs in the house. I find it hard to believe that Mr. Hall would not have mentioned that in his verbal report.

[44] Ms. Rodrigue also questioned certain possible deficiencies during the inspection, including a rough area on the foundation which she says both Mr. Snarby and Mr. Hall made light of. She also questioned the state of some of the boards on the deck, but Mr. Hall thought they were of no concern.

[45] It is difficult on the evidence to pinpoint the exact moment that Ms. Rodrigue began to have serious thoughts about continuing with the purchase, but it was fairly early on.

[46] Another issue that raised her sense of alarm included the status of the woodstove in the outbuilding, and whether it was WETT certified. She says that Mr. Snarby told her that it was WETT certified and that a certificate would be provided before closing. It turns out that no such certificate was available and the stove was not WETT certified. The sellers denied ever representing that this was a WETT certified wodstove. Mr. Snarby denied ever saying that it had been. On balance, it seems more likely than not that the Claimant got this impression from someone, who was more likely Mr. Snarby than anyone else.

[47] On the other hand, the documentary evidence shows that Ms. Snarby asked the sellers in an email whether the stove was WETT certified, and they said that they did not know. I find it hard to believe that Mr. Snarby would have promised a WETT certificate knowing, as he did, that the sellers knew nothing about it.

[48] While WETT certification is desirable, there was no evidence that the Claimant's insurance company demanded it as a condition of insuring the property; nor was there any evidence that the woodstove was unsafe or non-functional. The sellers were using the woodstove without any apparent problem.

Exterior drainage

[49] One of the major issues for Ms. Rodrigue concerns drainage, and specifically whether there had been any improvements made by the sellers. Ms. Rodrigue recounted an early conversation with Mr. Snarby about the basement, and whether there would be a water problem. She said that Mr. Snarby told her that it "used to flood" but the sellers had fixed it. According to Ms. Rodrigue, he told her that the sellers had put in a French Drain to divert the water away from the foundation.

[50] The text exchanges between Mr. Snarby and Ms. Rodrigue include a few references to drainage. Before the house was even viewed by Ms. Rodrigue, Mr. Snarby told her in a text *"updated basement (old one used to get some water) so they did work to basement, and drainage around the house etc.. no issues since .."*

[51] In another text around the same time, when asked about recent improvements to the property, he stated *"...concrete work in basement, sump pump, drainage around exterior ..."*

[52] The term French Drain does not appear in any text. The sellers never referenced any such work in the PDS. Mr. Hall in his report makes no reference to any drainage work likely having been done recently; in fact, he comments on shrubbery having been allowed to grow too close to the house, which should have signalled that the ground had not been disturbed by digging the trenches that would have been part of the French Drain. Mr. Hall stated in his testimony that he walked around the foundation with Ms. Rodrigue and pointed out to her those areas where shrubbery should be removed.

[53] Ms. Rodrigue knew, or ought to have known, that the presence of overgrown shrubbery close to the foundation was a clear indication that no recent work had been done to improve drainage around the foundation.

[54] Mr. Snarby denied ever saying that there had been a French Drain installed at the property. He also stated that any information he conveyed to Ms. Rodrigue was based on what the sellers had told him, and he did not independently verify any such information. He admitted that he referred to drainage work around the house, but admitted that he might have confused that with work in the basement.

[55] I am willing to find that Mr. Snarby was careless in stating that drainage work had been done. Although it is not in the texts, I believe Ms. Rodrigue when she says that Mr. Snarby spoke of a French Drain. This is not enough in itself to create liability, as it remains to be established whether it was reasonable for Ms. Rodrigue to rely on these statements, given who Mr. Snarby was and the other opportunities that she would have had to verify the information.

[56] I further find as a fact that Ms. Rodrigue knew from the information conveyed by Mr. Hall that there had been no recent drainage work done.

Later flooding event

[57] Several months after the closing she came to learn several things when her basement flooded during post-tropical storm Dorian. One of the things she learned was that she needed to have a generator to operate the sump pumps in the event of a power failure. When she viewed the property, there was a generator owned by the sellers but it was not included in the purchase price. Ms. Rodrigue evidently believed that there was some form of battery backup that would operate

the sump pumps. It is not even clear that she saw the generator, as it would have been stored outside somewhere and only brought out when needed.

[58] It is regrettable that no one explained to Ms. Rodrigue that having a generator was a necessity and that her property would be at significant risk of flooding if the sump pumps were not able to operate, even for a few hours. It is also undeniable that Ms. Rodrigue displayed some naivety, because she evidently never turned her mind to what might have been obvious to most people.

[59] It is also a fact that post-tropical storm Dorian was one of the worst flooding events in recent Nova Scotia history, and there were flooded basements all over the province. There was no evidence to the effect that the previous owners had ever had to contend with a rain event of that magnitude during their years of ownership.

[60] Ms. Rodrigue is a person who has mobility issues, and it is difficult for her to go down the somewhat primitive set of stairs into her basement. She says she relied on Mr. Snarby and Mr. Hall to check out the basement for her. Now in light of what she has experienced, she has to go down to the basement frequently which is not something she had intended to do.

Property Disclosure Statement (PCS)

[61] As is also common in many real estate transactions, the sellers provided a property disclosure statement, which had been signed on June 9, 2019, i.e. just around the time that Ms. Rodrigue started thinking about buying the property.

[62] Ms. Rodrigue asserts that they gave false or misleading answers to some of the questions.

1.1 are you aware of any structural problems, unrepaired damage, dampness or leakage?

[63] To this question, they answered *"yes"* and gave the following explanation:

Basement does get water, sump pumps and trench in floor take it away.

1.2 are you aware of any repairs to correct structural damage, leakage or dampness problems?

[64] To this they also answered *"yes"* and explained:

New basement floor poured November/18.

[65] Ms. Rodrigue contends that these explanations understate the problem. In her experience the basement is *"constantly flooding from the sump pit overflowing, to the channel filling up and not draining, water coming in from the walls/patches, water coming up underneath the furnace area and through the cement slab."*

2.4 Are you aware of any problems and/or malfunctions with the heating/cooling sources?

2.7 Are you aware of any repairs and upgrades having been carried out to the heating/cooling sources?

[66] To 2.4 they answered *"no"* and to 2.7 they added *"new pieces of ducting installed Oct/18 by Irving."*

[67] Ms. Rodrigue contends that this was false because *"the furnace was not installed properly, had holes in the duct work that was allowing Carbon Monoxide to leak into the home, the furnace itself had a huge hole rusted through the inside that was again allowing Carbon Monoxide to leak into the house's ventilation system."*

2.6 Are you aware of any problems or malfunctions with the chimney?

[68] To 2.6 they answered *"no."*

[69] Ms. Rodrigue says that this was false, *because "the chimney was not to code, was improperly installed and was also a fire hazard given it was propped up with logs in the attic section. The chimney is also too short to meet code requirements. The stove itself and its installation also didn't meet code (WETT certification)."*

4.1 Are you aware of any problems and/or malfunctions with the electrical system?

[70] To this they answered *"no."*

[71] Ms. Rodrigue says that *"the inspection revealed many electrical issues*

where present, including reversed polarity, fire hazards, possible electrocution, etc."

5.1 Are you aware of any problems and/or malfunctions with the plumbing system?

[72] To this they answered *"no."*

[73] Ms. Rodrigue says *"they did not keep up with the regular maintenance schedule of having the septic tank emptied (recommendation is every 4 years). Using "Septi-Bac" is not a replacement for having the tank emptied. This product helps to break down waste, it doesn't make it evaporate. The tank still needed to be emptied regularly to prevent damage to the plumbing system, septic tank and septic field and the house's foundation."*

6.2 Are you aware of any problems with water quality, quantity, taste, odour, colour or water pressure?

[74] The sellers revealed that there was some iron in the water.

[75] Ms. Rodrigue contends that the answer failed to reveal water supply issues, because *"the well has run dry every summer since I moved in, except for this past summer which was an unusually wet summer. The well didn't go dry but was running quite low."*

9.3 Have you, as the current owner, obtained the necessary permits for improvements on the property?

[76] The sellers answered *"does not apply."*

[77] Ms. Rodrigue contends that *"they should have obtained permits at the very least for the work done to the foundation. Given the Seller's father is a licensed contractor and a business was hired to do the work, I find it hard to believe "no one knew" they had to get a permit. The absence of permits was confirmed in an email I provided from Queens County, confirming no permits had ever been issued for that property at that time."*

[78] I will discuss later whether or not I consider any of the answers to have been false or misleading.

Other post-closing issues

[79] Since the closing Ms. Rodrigue has experienced other problems that she did not anticipate. She says that there is no vapour barrier in the attic, leading to dry rot. She is facing thousands of dollars of upgrades there.

[80] She says that there is evidence of water damage through the roof damaging the drywall ceiling in some areas.

[81] She says that the shed roof leaks.

[82] The hot water heater broke down. On the day of closing, Mr. Snarby went down to check the basement for Ms. Rodrigue and reported that all was in order. Only a few days after the closing, the hot water tank failed and needed replacement. This was probably the first major incident post closing.

[83] Was this just bad luck, or did somebody know something that they neglected to advise Ms. Rodrigue?

[84] It is common knowledge that hot water tanks have a particular lifespan and once they spring a leak, that is typically a sign that the tank needs replacement. Mr. Hall noted in his report that the hot water tank was eight years old and nearing its useful life, which information he may or may not have mentioned in his verbal report. Still, it could have gone on without incident for a few more years and there is no evidence that the hot water tank displayed any overt signs of being on its last legs, and, strange as it may be, it was probably just bad luck.

The septic tank

[85] The state of the septic tank took on an exaggerated significance in this case, but it provides a small window into Ms. Rodrigue's mind.

[86] It was a term of the agreement of purchase and sale that the sellers would have the septic tank emptied before closing. On the day of closing, Mr. Snarby showed Ms. Rodrigue a receipt showing that the septic tank had been emptied on July 17, 2019 - just two days previous. This receipt was from a reputable septic company in the area, Winchester Disposal Service.

[87] Approximately a year later, Ms. Rodrigue experienced problems with the septic system and had to have the tank emptied again. This has caused her to theorize that the sellers never in fact emptied the tank before closing, and that the receipt shown to her was fraudulent.

[88] There are a number of reasons why I find this hard to accept. Although I

cannot explain why the system would need to be pumped so soon after, the company that Ms. Rodrigue hired to empty her septic system was the same one that had supposedly done it a year earlier. It is a reputable company and the notion that it would create a false invoice for the sellers, for an amount less than $300.00, is preposterous. This causes me to question Ms. Rodrigue's credibility. She appears to have jumped to the most sinister explanation for an event that likely has a much more innocent, if unknown, explanation.

[89] Ms. Rodrigue also bases her suspicion on the fact that the ground around the septic hatch appeared to her to be undisturbed, suggesting to her that no one had gone into the hatch before closing.

[90] This accusation is not supported by the evidence. Mr. Nickerson testified that he personally observed the entire septic-emptying process on July 17, 2019. I see no reason to disbelieve that testimony. The notion that he would conspire with Winchester Disposal to create a fake invoice, in order to save a few bucks and avoid having the septic tank pumped out, is doubly preposterous.

Water issues

[91] As referred to earlier, Ms. Rodrigue also reports problems with the adequacy of her well. She says that she asked Mr. Snarby during the purchase phase whether the well had ever gone dry, to which he replied that it had not to his knowledge. Ms. Rodrigue also complained that she believed there was a UV system for treating the water in the house, which she believed was operational.

[92] It turns out that the sellers did not use the UV system at all, but relied on the fact that the water tests showed the water supply to be in good condition. This was known to Ms. Rodrigue before the closing when the well water was tested and Mr. Snarby commented in a text that the owners had never used the UV, and that it was not even connected.

[93] Ms. Rodrigue testified that her well went dry the first summer after she purchased the property. She says this is surprising because her water use is minimal, given that she lives alone.

[94] There was no evidence that the sellers had ever experienced water shortages. Granted, it is not easy for someone in Ms. Rodrigue’s position to prove that the sellers had experienced such a problem. Ms. Rodrigue hopes that the court will make the inference that they <u>must</u> have known that the well was prone to running dry.

Electrical issues

[95] Electrical issues discovered during the home inspection also took on an outsized significance for the Claimant. Mr. Hall found a number of outlets in the home to have reversed polarity. He also identified the need for a GFI plug in the kitchen. I say that Ms. Rodrigue's concerns were exaggerated not because reversed polarity is not unsafe, but because it is simple and inexpensive to fix.

[96] On June 24, 2019, electrician Wayne Rafuse was hired by the sellers to deal with the electrical concerns. He signed a document which was provided to Ms. Rodrigue, to indicate that her concern had been met. It stated as follows:

> All electrical checked by a certified electrician - Wayne Rafuse on Monday, June 24th:
>
> Plugs in the kitchen are to code and regulations. No GFI's are required and would not need to be replaced. New construction or renovations you would have to install 20 amp GFI's.
>
> Plug in master bath is upside down, and is not an issue.
>
> GFI on back deck is connected to the plug on the front of the house so it will trip if something gets overloaded.
>
> All other items will be fixed in accordance to the offer.

[97] In a further visit to the home, Ms. Rodrigue tested the polarity throughout the house and discovered that there were a couple of plugs that still showed reversed polarity. She also insisted that there be a GFI plug installed on the kitchen counter area. This was also supposedly done by Mr. Rafuse on July 17, 2019, as evidenced by an invoice to that effect. It was not until the preclosing inspection that Ms. Rodrigue could verify that there were no outstanding electrical problems. According to Ms. Rodrigue, not everything had been corrected.

[98] I am not impressed with the fact that Mr. Rafuse had to go back a second (and possibly a third) time to complete what should have been an easy job. While none of this is serious in itself, it simply contributed to Ms. Rodrigue's sense that things were not going as well as they should have and that her concerns were not being taken seriously.

Did Ms. Rodrigue ask Mr. Snarby to terminate agreement?

[99] Ms. Rodrigue says that she kept raising red flags as the closing approached, but Mr. Snarby kept encouraging her to continue with the purchase. It is notable, however, that in the pages upon pages of text communication and emails between Ms. Rodrigue and Mr. Snarby at no time does Ms. Rodrigue ever raise the possibility of terminating the agreement.

[100] Mr. Snarby testified that Ms. Rodrigue never instructed him to terminate the agreement. Ms. Rodrigue was familiar with terminating agreements, as she had just been through that process with two of the other properties that Mr. Snarby had shown her, where she had made offers and then terminated them during the conditional period.

[101] As a rule, I give much more weight to what has been put in writing than I do to what has allegedly been said by people who are relying on their own memories, coloured as they may be with self-interest. Given how much communication was done through texts and email, I cannot accept that something as important as possibly terminating an agreement would have been left only to verbal communication. I find as a fact that Ms. Rodrigue never explicitly instructed Mr. Snarby to terminate the agreement.

[102] That is not to say that she did not express unhappiness with some of what she saw and was happening, but it appears that Mr. Snarby took these complaints as problems that he had to try and solve, rather than deal breakers. He did understand that Ms. Rodrigue was prepared to delay the closing until her concerns were alleviated, which is a far cry from terminating an agreement with all of the potential liability that comes with such a step.

[103] As well as negotiating the $500.00 credit from the sellers, he also agreed to contribute $500.00 out of his own pocket toward her legal fees, in what appeared to have been a good faith effort to facilitate the transaction. I find that Mr. Snarby believed that Ms. Rodrigue wanted to close and he was trying to make that happen.

Dealings with Folk Law

[104] As already mentioned, Ms. Rodrigue retained Folk Law to represent her in the transaction, on the recommendation of Mr. Snarby. She knew from the outset that Folk Law would be representing the sellers, as well.

[105] What is notable in the situation is the fact that Ms. Rodrigue never even met Mr. Folk until well after the transaction had closed and problems had already

arisen. All of her dealings were with paralegal Yvonne Wentzel. It turns out that Mr. Folk was not even in the office on the day of closing, but was on vacation camping with his family. He testified that he was accessible by cell phone, and I have no reason to doubt his word on that point. It makes sense that he would be reachable.

[106] Before agreeing to represent Ms. Rodrigue, Folk Law sent a Retainer and Authorization which made clear that there was dual representation. However, such documentation appears not to have been sent to her until approximately nine days before the closing, and she only signed the Retainer and Authorization on July 15, 2019, four days before the closing. That document contained the following proviso:

> The undersigned acknowledges that Folk Law Inc. is also acting on behalf of the sellers and will be representing them as well as myself in relation to this transaction and hereby consents thereto. The undersigned acknowledges that Folk Law Inc. is bound to make complete disclosure to all parties and further that should a conflict arise in this transaction it would then be necessary for Folk Law Inc. to withdraw entirely from the matter and refer everyone to separate solicitors and hereby consents thereto.

[107] In the days leading up to the closing, Ms. Rodrigue had been expecting some of the identified deficiencies to be dealt with. On the basis of an early morning walk through with Mr. Snarby on the closing day, Ms. Rodrigue was dissatisfied and says that she threatened (to him) not to close. The items that she was concerned about included multiple nail holes in the walls, incomplete paint jobs, dirty conditions throughout, and a lingering problem with reverse polarity in some electrical sockets in both the main house and outbuilding. Ms. Rodrigue testified that she went in to the law office and told Ms. Wentzel that she was unhappy and would not close. She says that Ms. Wentzel told her words to the effect: *"this transaction needs to close at 5 o'clock because she* [the seller?] *needs to close."* She also says Ms. Wentzel told her that if she took the position that she was not going to close, that it would put the law firm in a conflict of interest and *"we can no longer talk to you."* Ms. Rodrigue says that Ms. Wentzel simply refused to accept the instructions to abort the closing. Ms. Rodrigue says that she asked to speak personally to Mr. Folk, but Ms. Wentzel would not allow that. Ms. Rodrigue did not even know until weeks later that Mr. Folk was on vacation on the day of closing.

[108] Ms. Rodrigue says that she felt bullied and helpless, that no one was taking her concerns seriously and that she had no choice but to close.

[109] Potentially aborting a real estate closing is not a small matter. If Ms.

Rodrigue had seriously intended to walk away from the transaction, one would expect there to be some written record of that. She already knew from her experiences with Mr. Snarby on previous transactions that there is paperwork that one can generate purporting to terminate a transaction. This was never done. Nor is there a single text or email to Mr. Snarby or to Folk Law expressing that the problems being identified with the property were placing the entire transaction in jeopardy.

[110] In fairness to Ms. Rodrigue, she very likely found herself in a state of uncertainty as to her legal rights. Ideally she would have had a lawyer to consult about her rights. However, she had already placed herself in a position where her lawyer would have had to declare a conflict of interest. In a fast-moving situation such as existed here, it is hard to see how she could have been fully and properly advised in a timely fashion.

[111] It did not help that Ms. Rodrigue only received her welcome package from Folk Law nine or ten days before the scheduled closing. It did not give her any appreciable time to reconsider her decision to use the same lawyer as the sellers.

[112] It was also the testimony of both Mr. Snarby and Ms. Wentzel that they never understood that Ms. Rodrigue was potentially willing to scuttle the transaction.

[113] On July 19 at 3:57 p.m., Ms. Wentzel sent an email to Ms. Rodrigue stating the following:

> Kristopher [Snarby] has advised that you will close the purchase on the condition that you receive an additional $500 credit to have the electrical, soffit and cleaning done. You will also assume any cost of painting the home with the Nickersons providing up to 11 gallons of paint. This is agreeable to the Nickersons. You will need to see Christine Nickerson at Bradys in Brooklyn to have the paint provided. She has the colour codes saved and if you wish to change any colours that is okay to them as long as it is only one coat of paint per room. Christine advised that it will take less than 1 gallon per room to paint.

[114] About eight minutes later, Ms. Rodrigue answered the email saying:

> This is agreeable to me also.

[115] Christine Cooke-Nickerson testified that on the day of closing, she was informed by Ms. Wentzel that there were some issues and this is how the idea of the $500.00 credit came up. She says that she never understood that Ms. Rodrigue

was potentially unwilling to close, except for the minor matters that had to be attended to.

[116] Mr. Folk testified that it is not unusual in his real estate practice for the paralegals to do most of the work. He says that in the summer, he can't be in the office for every transaction but he makes sure that he is reachable by cell phone in the event of issues. He says that he did receive a call on the day of closing around lunchtime where Ms. Wentzel told him that there were some issues arising from the pre-closing inspection, but that they were being ironed out. He said that this is not uncommon. At no time did Ms. Wentzel call him and alert him to the possibility that the closing might not go ahead.

[117] He stated that in cases of a joint retainer such as this, the realtor takes the lead in negotiating last-minute adjustments.

[118] Overall, he did not consider this transaction to be out of the ordinary, which it would have been if he had ever been informed that there was a potential for the closing to fall through.

[119] Mr. Folk also recalled meeting Ms. Rodrigue several weeks after the closing, at Ms. Rodrigue's request. It was during this meeting that she informed him that the hot water tank had blown the day after the closing, and taking pity on Ms. Rodrigue he offered her a small credit on the legal fees. He testified that during this meeting Ms. Rodrigue never told him that she had considered not closing, or that she was bullied into closing by his staff.

[120] Ms. Wentzel also testified. She is a paralegal with 48 years of experience, and has been working in Liverpool since 1989. She described the practice as being primarily property files with some estate work. She described it as a busy office. She stated that the legal work for the transaction does not really begin until the conditional period has passed and all conditions have been met.

[121] She stated that had Ms. Rodrigue asked to terminate the agreement, they would have had to withdraw from both sides and send them both to independent lawyers. She understood that there were some issues involving deficiencies, but she believed that Mr. Snarby was attempting to find a solution.

[122] Ms. Wentzel was very clear in her evidence that Ms. Rodrigue never told her she wanted to terminate the transaction, nor did she hear anything from Mr. Snarby to that effect.

[123] Ms. Wentzel testified that it was not until reading the pleadings in this

litigation that she had any inkling that Ms. Rodrigue had not wanted to close the transaction.

[124] Ms. Wentzel testified that it is not unusual to negotiate holdbacks in order to allow closings to proceed, and it is not unusual for the agent to work this sort of thing out.

[125] I do not believe that anyone is outright lying about what happened that day. I allow for the fact that all of the involved persons, Ms. Rodrigue, Mr. Snarby, Ms. Wentzel and Mr. Folk all have an interest in this matter and view the events through the lens of that self interest. I favour a view that they were talking at cross-purposes. From the point of view of Mr. Snarby, Ms. Wentzel and Mr. Folk, this was a fairly routine transaction in a small community where inevitable minor problems get ironed out with practical solutions. And it is their experience that people actually want to complete their transactions. Joint representation is relatively common because there are few lawyers in town, and truly deal-breaking issues are rare.

[126] Ms. Rodrigue may have been trying to express her deep dissatisfaction, but this never registered. There is a world of difference (in terms of the legal implications) between saying *"I won't close until my concerns are satisfied"* and *"my concerns have not been satisfied and I will not, under any circumstances, close."* I find it hard to believe that clear instructions to terminate the transaction would have been ignored by Mr. Snarby or Ms. Wentzel. I find it hard to believe that Ms. Wentzel would not have phoned Mr. Folk for directions, had she been receiving that message.

[127] The surest way to have communicated that message would have been for Ms. Rodrigue to put it in writing AT SOME POINT TO SOMEONE. This she did not do.

A general comment on credibility as it pertains to this case

[128] In two-party cases, it is sometimes easy to reduce the exercise of assessing credibility to a binary decision: whose evidence do I prefer? Which party seems more reliable? Which narrative has the ring of truth?

[129] Where there are multiple parties such as here, with overlapping areas of involvement, the result is more nuanced, and the hill is more difficult to climb for Ms. Rodrigue. She must place her own credibility up against several people, or sets of people, and runs the risk that an adverse finding in one context will reflect poorly against her in another.

[130] For example, if I find her evidence concerning her dealings with Mr. Hall to be less worthy than that of Mr. Hall, it is inevitable that she may be seen as less credible in her contest with another party.

[131] As has been observed many times, credibility is not just about truth-telling. It is about which evidence seems more plausible in light of the inherent probabilities of the situation. The test has been stated in many ways, but none better than by O'Halloran J.A., of the British Columbia Court of Appeal in the case of *Faryna v. Chorny* [1952] 2 DLR 354 at p.357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses.

[132] My overall assessment of Ms. Rodrigue is that she is sincere and is not deliberately telling any untruth, but I am troubled by her seeming willingness to jump to conclusions and attribute sinister motives to others who are more than likely trying their best not to mislead. Ms. Rodrigue presented the case almost as a conspiracy perpetrated by all of the Defendants. This is a bridge too far, and it causes me to view her evidence with some suspicion.

THE DAMAGES CLAIMED BY MS. RODRIGUE

[133] In her documents Ms. Rodrigue itemizes the damages that she says she has suffered, including a few things she has done and others that she is being advised to have done. The total is $134,652.73, which is ironically almost exactly what she paid for the property.

[134] The major line items upon which I propose to comment are:

a. Repairs needing to be done: $114,917.30

b. Work already done: $2,288.88

c. Overpayment on purchase: $8,000.00

[135] Ms. Rodrigue has presented estimates for major projects (mostly by a company called Parsons) including:

a. Replacing the entire fence for $12,554.07

b. Removing the old deck and replacing it with patio stones for a total of $6,266.89

c. Stripping the old shingles off the shed and replacing them at a cost of $1,846.37

d. Blowing in attic insulation for a total of $2,866.15

e. Drywall repairs to the ceiling in the amount of $4,756.98

f. Installing a door in the basement opening at a cost of $3,535.19

g. Painting the two outbuildings at a cost of $5,175.00

h. Garage repair including removal of the existing roof and replacing it with a new roof, at a total cost of $39,645.13.

i. A plumbing estimate of $3,392.50 to bring the plumbing venting up to code.

[136] These next items involve drainage or related items:

a. Digging around the foundation, and installing drain tile etc. at a cost

of $9,671.50

b. A French drain costing $9,539.25

c. Pump and a pump tank costing $3,427.00

d. Repairs to the foundation at a cost of $12,241.27

[137] Ms. Rodrigue called several witnesses to backup these estimates. Scott Killam is a construction manager and estimator who talked about the state of the house foundation. It was his view that the only way to prevent ongoing water incursion into the basement was by improving the exterior drainage. He confirmed, which we all know, that there is no French Drain on the property nor any evidence of a lesser form of recent drainage work. He did not have positive things to say about the concrete job in the basement.

[138] Matthew Smicer is the individual who produced the quotations on behalf of Parsons. He was critical of a number of things that he inspected. The staircase to the basement lacks any kind of railing system. There is dry rot in the wood. There is inadequate insulation in the main attic. There is no vapour barrier. There is no ventilation into the attic. The deck lacks proper footings and is rotting. He talked about multiple deficiencies of the attic in the man cave, and he regards it as unsafe. He described problems with the utility shed roof. The parts of the fence that do exist he regarded as improperly braced and essentially makeshift. He was also highly critical of the paint in various places.

[139] Mr.'s Smicer's credentials are that he has been a lead carpenter doing new home construction and renovations for approximately 23 years.

[140] The total of the quotes that he prepared, adding up to approximately $100,000, would not even bring the property up to Code but would largely do so.

Initial comments on damage claims

[140] The alleged $8,000.00 overpayment was never explained to my satisfaction by Ms. Rodrigue, and is difficult to reconcile with the other damage claims. If she contends that she overpaid for the property, in light of all of the problems that she has encountered, then she would be saying that the home was only worth $126,500.00 in its current condition. If that were the case, then all of the other damages could not also be recoverable.

[141] If it would take $134,000 to improve the property to the level of the

Claimant's expectations, at the price she agreed to pay, then one would have to conclude that the property had no value. That proposition is hard to credit.

[142] The Claimant knew she was purchasing a modest 54-year-old home. If she were to undertake everything she proposes, what would result would not be the house she expected and there would be a substantial "betterment" argument to consider in any assessment of damages.

THE CLAIMANT'S ASSERTIONS

[143] The Claimant refers to the Defendants' *"cumulative negligent and wrongful actions"* regarding this transaction, before, during and after the day of the closing, as *"nothing short of wrong - legally, morally and ethically."*

[144] She alleges that Mr. Snarby, Mr. Folk and Mr. Hall's actions all breached their professional obligations towards her. She says they did not protect her best interests during the process, withheld information and misrepresented the state of the property.

[145] And she accuses the sellers of having made negligent or intentional misrepresentations in the PDS.

[146] I will address these in turn.

Stephen Hall

[147] In her written submissions, Ms. Rodrigue summarized her claim against Mr. Hall:

> *Mr. Hall breached our verbal contract with me by cutting off communication and not producing a written report of the house inspection when I asked, repeatedly, for it to be done. He also breached the contract by withholding important information regarding his findings during his inspection. Information that, had I been made aware, would have stopped any further steps regarding purchasing this property.*

[148] It is true that Ms. Rodrigue asked Mr. Hall to complete his written report sometime in or about 2020, and he never followed through with this. He explained that he was extremely busy during the early phase of the pandemic and did not get around to it. But I consider this a red herring. The harm done, if any, had already occurred.

[149] The real issue is whether the inspection was negligently performed at the time, thus causing or contributing to Ms. Rodrigue's decision to go ahead with the purchase based on bad advice.

[150] The law with respect to the liability of home inspectors was exhaustively set out in the Supreme Court of Nova Scotia decision of Smith A.C.J. (as she then was) in *Gesner v. Ernst* (2007) 2007 NSSC 146 (CanLII), 254 N.S.R. (2d) 284. She adopts the test used in other provinces:

> 190 In the case of *Brownjohn v. Ramsay*, 2003 BCPC 2 (CanLII), [2003] B.C.J. No. 43 (B.C. Prov. Ct.) Stansfield, A.C.J. gave, in my view, a very useful review of the tort of negligent misrepresentation as it relates to home inspectors. He stated at paragraphs 16 - 24:
>
> ¶ 16 The point made repeatedly in the PTP contract, and mentioned consistently in the various cases to which I was referred but most importantly, which simply accords with common sense is that there are limits on what one reasonably can expect from a relatively brief visual inspection undertaken by someone who has no right to interfere with (and by that I mean no right to dismantle, nor to effect any permanent change in) the property which one must remember is not owned by the person requesting the inspection. As well, as a matter of common sense one has to recognize that a service performed for a fee of $240.00 cannot be expected to be exhaustive.
>
> ¶ 17 The broad purpose of securing a residential home inspection is to provide to a lay purchaser expert advice about any substantial deficiencies in the property which can be discerned upon a visual inspection, and which are of a type or magnitude that reasonably can be expected to have some bearing upon the purchaser's decision making regarding whether they wish to purchase the property at all, or whether there is some basis upon which they should negotiate a variation in price. Broadly speaking, it is a risk assessment tool.
>
> ....
>
> ¶ 19 In *Drever v. Eaton*, unreported, November 14, 2000, Victoria Registry No. 28199 (Provincial Court), my colleague Judge Filmer dealt with a claim against a home inspector, and mentioned in passing:

(The home inspection) was not being used as an assurance of the structural integrity of this building. To do that for $200 would be a fool's errand, in my view.

> ¶ 22..............What is the test in law for "negligence" in the context of home

> inspections?
>
> ¶ 23 Because the core of the service provided by the home inspector is the advice given regarding the condition of the home, claims against home inspectors in superior courts have been pleaded and considered by the court in the context of the tort of negligent misrepresentation. The five elements to be proven in that tort, as articulated by the Supreme Court of Canada in *Queen v. Cognos Inc*. (1993) 1993 CanLII 146 (SCC), 99 D.L.R. (4th) 626, are well established:
>
> > 1. there must be a duty of care based on a special relationship between the parties,
> >
> > 2. the representation made by one party to the other must be false, inaccurate or misleading,
> >
> > 3. the representation must be made negligently,
> >
> > 4. the person to whom the representation is made must have reasonably relied on the representation and,
> >
> > 5. the reliance must have been detrimental to that person with the consequence of his suffering damages.
>
> ¶ 24 The third requirement that "the representation must be made negligently" one presumes will fall to be determined by application of the test applicable to other types of "professional negligence", namely, that the home inspector failed to meet the standard of care expected of a reasonably prudent home inspector in those circumstances and at that time.

[151] In asking the question whether the report was negligently performed, I must distinguish between the verbal report and the later-produced written report.

[152] Looking first at the written report, I cannot say that Mr. Hall totally missed anything that he ought to have discovered. And it is not clear from Ms. Rodrigue's argument specifically what she believes he got wrong in terms of what that report contains.

[153] But she did not have a written report at the critical time. Thus the real question is whether his verbal report failed to mention something that was critical to Ms. Rodrigue in deciding whether to go ahead with the transaction or what conditions to impose on the sellers.

[154] And there is a considerable discrepancy between the two versions of what

was conveyed.

[155] Mr. Hall produced his detailed though somewhat shorthand notes taken while performing his inspection. He also took photographs which are in his report. All of this would have been in his hands when he gave Ms. Rodrigue his verbal report. It was on the basis of all this information and likely nothing else (other than memory) that he later produced his written report.

[156] I consider it more likely than not that Ms. Rodrigue was present to hear much of Mr. Hall's patter during the inspection, and that she was told the substance of it after he was finished. Mr. Hall is a very experienced home inspector and I find it hard to believe that he would have withheld important findings, knowing as he did that there would not be a written report.

[157] I have already observed that, in retrospect, it was a very bad idea to limit it to a verbal report. Other than the fact that she was apparently being careful with her money, Ms. Rodrigue gave no convincing explanation for why she would have been satisfied with a verbal report. The notion that she was relying on Mr. Snarby's assessment of the house as in "excellent condition" seems hopelessly naive, if true. She also mentioned that she already had a written report from the earlier, aborted purchase, but though these reports contain a certain amount of boiler plate it would have had no bearing on this different property.

[158] Ms. Rodrigue also knew, or ought to have known, that the agreement she signed on that day placed severe limits on Mr. Hall's liability. I am no fan of limitation clauses in contracts like this, and have found them unenforceable in other cases, but this to me is as clear a case as I can imagine where either this limitation is enforceable, or no limitation clause would be. The wording is clear and unambiguous. I believe Mr. Hall when he says that he insisted Ms. Rodrigue sign it before he would do any work.

[159] I have not been provided with any authority that would hold such clauses to be unenforceable despite being clear and clearly understood by the person agreeing to it.

[160] I am also mindful of what was commented upon in some of the cases cited above, which is that someone paying $250.00 for a general inspection ought not to have high expectations. To an extent, you get what you pay for. Home inspectors play a useful role in the real estate industry, and courts must be careful not to place too great a burden of responsibility on them.

[161] It is also difficult for me to assess Mr. Hall's duty in the absence of any

evidence of the standard of care. Professional negligence cases are rarely decided in a vacuum.

[162] In the result, I do not find Mr. Hall to have breached his professional duty to the Claimant, and the claim against him will be dismissed.

Kristopher Snarby

[163] Ms. Rodrigue summarized her complaints against Mr. Snarby as follows:

> *Mr. Snarby breached the Buyer Customer Acknowledgement with me, which states quite clearly that he can not negligently or knowingly provide false or misleading information to me (the Buyer). I have shown a great deal of evidence to support the multiple lies and misrepresentations he made in order to secure the sale.*

[164] Ms. Rodrigue points to several instances of misrepresentations:

a. Describing the home as in "excellent condition."

b. Describing the yard as "fenced."

c. Stating that there had been drainage tiles and a French Drain installed to fix the basement flooding issue.

d. Stating that the UV water treatment would be operational with the installation of a new bulb.

e. Stating that the woodstove was WETT certified.

f. Stating that the sellers had put a new roof on the outbuilding.

g. Stating that he had confirmed with the sellers that the well had never run dry.

h. Representing that the Seller's father had suffered a heart attack and been sent to Halifax for further treatment, in the days leading up to closing, to gain sympathy and explain why the Sellers hadn't met their obligations as well as the state of the home on the day of close.

i. Being a participant in the use of a false invoice from Winchester claiming to have pumped the septic tank a few days before closing.

[165] I find that there is some merit to the allegations against Mr. Snarby. I believe he was not as careful or precise as he could have been in trying to promote the sale of the property. But it should be recognized that Mr. Snarby was engaged in a selling exercise, and a certain amount of "puffery" on his part is to be expected.

[166] In *Lewis v. Miller*, 2015 NSSM 39, where the vendor of an All Terrain Vehicle was sued for making some exaggerated or incorrect statements about the condition of the item, I said this:

> 25 I do not wish to be taken as saying that a party such as the Defendant could not be held responsible for misrepresentation. Clearly false statements can be actionable, particularly if there is fraud. Here the evidence of what statements were made by the Defendant is extremely vague. It appears that the Defendant spoke about the various after-market improvements he had made, and work that had been done. It has not been proven that these statements were false. However, I did not hear evidence of the Defendant promising that the mechanical condition of the ATV was perfect. Even had there been general statements extolling the virtues of the ATV, there is a certain allowance made as sellers are expected to engage in a certain amount of "puffery."

[167] Statements by Mr. Snarby to the effect that the property was in excellent condition would clearly qualify as puffery, and it would not be reasonable for Ms. Rodrigue to place any reliance on that.

[168] Some of the other statements attributed to Mr. Snarby are a bit more problematic, but there was no real reliance on them. Ms. Rodrigue knew that the yard was not fully fenced; she could see that with her own eyes.

[169] Any statements by Mr. Snarby about drainage tiles and a French Drain, were clearly wrong, or misinterpreted, but by the time the inspection was finished Ms. Rodrigue had to have understood that there had been no such work done.

[170] Any statements by Mr. Snarby about the UV water treatment system were also wrong, but he also informed Ms. Rodrigue that the water was potable without any treatment, and this also would have been something to be confirmed in the inspection.

[171] The same comments apply to the woodstove and the allegedly new roof.

[172] The information conveyed from the sellers about the well never having run dry was the sellers' statement, not Mr. Snarby's. Mr. Snarby was asked to inquire of the sellers, and this he did. There is no basis to say that Mr. Snarby misstated what he was being told. He would have had no way of knowing if the well went dry, other than from the sellers.

[173] Ms. Rodrigue also complains that Mr. Snarby lied to her, saying that *"the Seller's father had suffered a heart attack and been sent to Halifax for further treatment, in the days leading up to closing, to gain sympathy and explain why the Sellers hadn't met their obligations as well as the state of the home on the day of close."* Mr. Snarby denied making such a statement, but it is hard to see where else Ms. Rodrigue could have heard this. Even so, Ms. Rodrigue did not rely on this statement in any material sense. It had nothing to do with the state of the property.

[174] As for the allegation that Mr. Snarby was *"a participant in the use of a false invoice from Winchester claiming to have pumped the septic tank a few days before closing,"* I do not accept that the invoice was false, or that Mr. Snarby played any knowing role in perpetuating a fraud. I have already commented that Ms. Rodrigue's continuing belief that there was a fraud reflects poorly on her reliability as a faithful reporter and interpreter of events.

[175] In the end, I do not believe that Ms. Rodrigue would have reasonably relied on any of Mr. Snarby's statements. She knew that Mr. Snarby was mostly passing on information that he supposedly received from the sellers, and Ms. Rodrigue had the sellers' direct information in the form of the PDS.

[176] Ms. Rodrigue also saw things with her own eyes, or was checking out the property via inspection, and it was not Mr. Snarby's statements that she was basing her purchase on.

[177] Even if Mr. Rodrigue could show that she reasonably relied on some of Mr. Snarby's information, the measure of damages would not be the cost of correcting the defects that she later discovered. The question would be whether she would have avoided the transaction altogether, or perhaps negotiated a lower price.

[178] In *Bowman v. Martineau*, 2020 ONCA 330, the Ontario Court of Appeal stated:

> [14] In other cases, however, the professional negligence will not have caused damage to property, but rather will have merely caused the plaintiff to enter into a transaction they would otherwise have avoided. For example, in *Messineo et al. v.*

> *Beale* (1978), 20 O.R. (2d) 49 (C.A.), a solicitor negligently failed to discover and report a pre-existing defect in the vendor's title but did not cause the defect. In *Toronto Industrial Leaseholds Ltd. v. Posesorski* (1994), 119 D.L.R. (4th) 193 (Ont. C.A.), a solicitor negligently failed to report the existence of an option to rent the purchased property at below current market rents but did not bring the option into existence. Finally, in *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, leave to appeal refused, [2011] S.C.C.A. No. 319, the real estate agent negligently failed to take any steps to inquire into the accuracy of the vendors' representations concerning the condition of the property, but did not cause its poor condition. In these cases, damages were assessed by looking to the overpayment paid by the plaintiff and their consequential damages, rather than the cost to repair or remove the defect.

[179] I find that Ms. Rodrigue did not rely on Mr. Snarby's mistaken or careless statements about the property, but had it been reasonable for her to do so she would, at most, have negotiated a slight reduction in the price.

[180] Ms. Rodrigue did not adduce any evidence of the actual value of the property in an "as is" state. She asserts that it is worth less than she paid, but did not say by how much. This is not something that I am prepared to accept on inference alone.

Christine Cooke-Nickerson and Stephen Nickerson

[181] Ms. Rodrigue summarized her complaints against the sellers as follows:

> *Mr. and Mrs. Cooke-Nickerson breached the Property Disclosure Statement (PDS) by providing false and/or misleading information when by signing it, they were attesting to the information given being true to the best of their knowledge as per section 13 of the PDS contract. I have proven this did not happen and that the Sellers lied on and about the information provided in the PDS.*

[182] Since the sellers had no direct contact with Ms. Rodrigue prior to the closing, it is only in the PDS that she seeks to ground a case of misrepresentation. She elaborated in her submissions:

> *a.* *1.1 Structural - They said basement gets "some water" but pumps take care of it. Fact is the basement is constantly flooding from the sump pit overflowing, to the channel filling up and not draining, water coming in from the walls/patches, water coming up underneath the furnace area and through the cement slab.*

b. *2.4 They said they were not aware of any issues with heating system and had Irving in to do some work. Fact is the furnace was not installed properly, had holes in the duct work that was allowing Carbon Monoxide to leak into the home, the furnace itself had a huge hole rusted through the inside that was again allowing Carbon Monoxide to leak into the house's ventilation system.*

c. *2.6 Problem with chimney. They stated no issues were present. Fact is the chimney was not to code, was improperly installed and was also a fire hazard given it was propped up with logs in the attic section. The chimney is also too short to meet code requirements. The stove itself and its installation also didn't meet code (WETT certification).*

d. *4.1 Issues with electrical. They said they were not aware on any issues. Fact is, the inspection revealed many electrical issues where present, including reversed polarity, fire hazards, possible electrocution, etc.*

e. *5.1 Plumbing system. They said they weren't aware of any issues. Fact is, they did not keep up with the regular maintenance schedule of having the septic tank emptied (recommendation is every 4 years). Using "Septi-Bac" is not a replacement for having the tank emptied. This product helps to break down waste, it doesn't make it evaporate. The tank still needed to be emptied regularly to prevent damage to the plumbing system, septic tank and septic field and the house's foundation.*

f. *6.2 Issues with water quality/quantity, etc. They said the well have never gone dry and had no issues. Fact is the well has run dry every summer since I moved in, except for this past summer which was an unusually wet summer. The well didn't go dry but was running quite low.*

g. *9.3 Necessary permits for improvements to the property. They said they never obtained any of the required permits for any work done on the home. Fact is, they should have obtained permits at the very least for the work done to the foundation. Given the Seller's father is a licensed contractor and a business was hired to do the work, I find it hard to believe "no one knew" they had to get a permit. The absence of permits was confirmed in an email I provided from Queens County,*

confirming no permits had ever been issued for that property at that time.

h. They also defaulted on the Agreement of Purchase and Sale by not complying with the terms of the Conditions of Sale, section 1 of said contract and provided fraudulent documents with the intention of misleading me again on the state of the property. Both documents were signed by both Mr. and Mrs. Cooke-Nickerson.

[183] The law concerning PDS's was succinctly commented upon by adjudicator O'Hara in *Waisman v. Adams*, 2019 NSSM 53:

> [18] The subject of Property Condition Disclosure Statements or Property Disclosure Statements as they are now referred has been the subject of a number of cases in the Nova Scotia Courts. In what is considered to be one of the leading cases, Associate Chief Justice Smith (as she then was) stated:
>
> > A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property…
> >
> > (*Gesner v. Ernst et al* (2007), N.S.S.C. 146, at para. 54)
>
> [19] A purchaser who alleges that a seller has not accurately answered one or more questions on the PDS has the burden of proof and must therefore prove, on a balance of probabilities, that this is the case.
>
> [20] To prove that a person had, at the relevant period of time, knowledge of a certain state of affairs requires proof of other facts which tend to show that the person would have had such knowledge. Obviously, we cannot peer into an individual's mind to see what knowledge they had at a particular point in time. However, if the other facts are compelling, courts will make a reasoned inference of a person's state of mind or knowledge of the state of affairs.
>
> [21] For example, many cases in this area deal with leakage in basements. In such cases if there is evidence of pre-existing conditions and/or evidence of significant leakage within a very short time of the closing, then the court will make an inference that the vendor must have known of that state of affairs (see for example, *Brisbin v. Gilby,* 2007 NSSM 66). There are other such examples in the case law.

[184] It is also clear in the law that the PDS is there to provide a measure of protection from latent, as opposed to patent, defects. Otherwise the principle of *caveat emptor* or "buyer beware" applies. In *MacIsaac Estate v. Erquhart*, (2019), N.S.C.A. 25, Hamilton, J.A., stated as follows:

> [52] The doctrine of caveat emptor provides that absent fraud, mistake or misrepresentation, a purchaser takes a property as he or she finds it, unless the purchaser protects him or herself by contractual terms; *Gesner v. Ernst*, 2007 NSSC 146 (CanLII), ¶44.
>
> [53] There are exceptions to this doctrine. One exception is that it does not apply where a vendor is aware of a latent defect of the property and does not disclose it to the purchaser; *McCluskie v. Reynolds* (1998), 1998 CanLII 5384 (BC SC), 65 BCLR (3d) 191 (BCSC), ¶54 and *Torfason v. Booth*, 2017 ABQB 387 (CanLII), ¶81. A latent defect is one that is not readily apparent to a purchaser during an ordinary inspection of the property he or she proposes to buy.

[185] To put it into plain language, Ms. Rodrigue can only succeed if she can demonstrate that there were defects not easily discoverable, that the sellers knew about and deliberately or negligently misrepresented in the PDS.

[186] If there was any ambiguity in the questions posed in the PDS, the sellers would likely receive the benefit of the doubt.

[187] As has been observed in other cases, it is impossible to know directly what is in other people's minds. In my experience, there are two possible ways to prove that a seller had knowledge that they did not disclose:

a. Sometimes it can be proved that the seller made an earlier statement to a third party, which reveals that they had knowledge of the defect.

b. Other times a condition may be so obvious, or so obviously concealed, that the inference can fairly be made that the seller <u>must</u> have had knowledge.

[188] Suspicion is not enough.

[189] I can also observe from my experience with many of these types of cases, is that they are hard cases to prove and they fail more often than they succeed.

Findings on alleged misrepresentations by the sellers

> *1.1 Structural - They said basement gets "some water" but pumps take care of it. Fact is the basement is constantly flooding from the sump pit overflowing, to the channel filling up and not draining, water coming in from the walls/patches, water coming up underneath the furnace area and through the cement slab.*

[190] The sellers revealed that they had upgraded the basement and sump pumps about a year before they put the property up for sale. They did not conceal that they had a “wet basement” and may well have believed that they had solved the issue by doing the work they did in 2018. There is no evidence that they experienced any serious flooding, especially not after they made the improvements that they did. Had the sellers been around for Dorian, they might well have experienced their system as inadequate.

[191] I do not find any intentional or negligent misrepresentation here.

> *2.4 They said they were not aware of any issues with heating system and had Irving in to do some work. Fact is the furnace was not installed properly, had holes in the duct work that was allowing Carbon Monoxide to leak into the home, the furnace itself had a huge hole rusted through the inside that was again allowing Carbon Monoxide to leak into the house's ventilation system.*

[192] The sellers were giving Ms. Rodrigue an almost new furnace to swap out for the one that was in the house, which would have had to be connected by a qualified installer. So Ms. Rodrigue did not rely on this statement. Plus, there is no inference to be drawn that the sellers knew specifically that CO was infiltrating the house. Nor was anything concealed such that an inspector might not have noticed it.

[193] Mr. Hall testified that he had concerns about the furnace that he conveyed to Ms. Rodrigue, but she did not seem to be interested in addressing that with the sellers.

[194] I do not find any intentional or negligent misrepresentation here.

> *2.6 Problem with chimney. They stated no issues were present. Fact is the chimney was not to code, was improperly installed and was also a fire hazard given it was propped up with logs in the attic section. The chimney is also too short to meet code requirements. The stove itself and its*

installation also didn't meet code (WETT certification).

[195] The sellers did not represent that anything was up to Code, and there is no implied warranty that any aspect of the property is up to Code. In any event, there is no evidence that they knew of these shortcomings, or that they tried to conceal anything.

> *4.1 Issues with electrical. They said they were not aware of any issues. Fact is, the inspection revealed many electrical issues where present, including reversed polarity, fire hazards, possible electrocution, etc.*

[196] This is precisely why Ms. Rodrigue had her own inspection: to reveal defects such as these. Even if the sellers knew of these deficiencies, and there is no evidence that they did, Ms. Rodrigue did not rely on this representation.

> *5.1 Plumbing system. They said they weren't aware of any issues. Fact is, they did not keep up with the regular maintenance schedule of having the septic tank emptied (recommendation is every 4 years). Using "Septi-Bac" is not a replacement for having the tank emptied. This product helps to break down waste, it doesn't make it evaporate. The tank still needed to be emptied regularly to prevent damage to the plumbing system, septic tank and septic field and the house's foundation.*

[197] The sellers disclosed what they knew and did not conceal anything. Ms. Rodrigue is merely critical of the sellers' standards.

[198] The agreement was that the septic tank was to be pumped out before closing. The evidence of Mr. Nickerson and the Winchester invoice satisfies me that this was done. Ms. Rodrigue has not established that this was a bogus invoice, and her insistence that it was not legitimate reflects poorly on her credibility.

[199] I do not know why her tank needed to be pumped again in 2020. But I expressly find that the sellers did not attempt to perpetrate a fraud on Ms. Rodrigue. I find that the sellers honestly believed that their tank had been pumped.

> *6.2 Issues with water quality/quantity, etc. They said the well has never gone dry and had no issues. Fact is the well has run dry every summer since I moved in, except for this past summer which was an unusually wet summer. The well didn't go dry but was running quite low.*

[200] It is entirely possible that the sellers never had a water shortage, for any number of reasons. Their usage pattern may have been different. The water table may have shifted. If it had gone dry, someone would likely have known about it, such as a water delivery service. Ms. Rodrigue did not produce any evidence that the sellers had ever had to order water, and no one asked them that question.

[201] This alleged misrepresentation has not been proved.

> *9.3 Necessary permits for improvements to the property. They said they never obtained any of the required permits for any work done on the home. Fact is, they should have obtained permits at the very least for the work done to the foundation. Given the Seller's father is a licensed contractor and a business was hired to do the work, I find it hard to believe "no one knew" they had to get a permit. The absence of permits was confirmed in an email I provided from Queens County, confirming no permits had ever been issued for that property at that time.*

[202] Whether or not they should have gotten permits, which is a debatable point, the sellers did not misrepresent anything.

> *They also defaulted on the Agreement of Purchase and Sale by not complying with the terms of the Conditions of Sale, section 1 of said contract and provided fraudulent documents with the intention of misleading me again on the state of the property. Both documents were signed by both Mr. and Mrs. Cooke-Nickerson.*

[203] Whether or not the sellers did everything they promised to do, Ms. Rodrigue agreed to close with a credit for deficiencies.

[204] Once again Ms. Rodrigue is accusing people, without proof, of providing her with fraudulent documents. There is no basis for any misrepresentation claim here.

[205] In the result, I do not believe that Ms. Rodrigue has established any liability on the part of the sellers, and the claim against them will be dismissed.

Christopher Folk (Folk Law)

[206] Ms. Rodrigue claimed in her closing submission that she received a *"lack of legal representation and negligence throughout the process."* She elaborated that her concerns *"included the conflicting letters from* [the electrician] *Mr. Rafuse as well as my being quite clear about not wanting to close on this home as there were*

way too many red flags and I was not OK with proceeding/closing on the day of close. At no point did I meet with, speak to, get legal advice from or direction from Mr. Folk. I also was never advised when discussing hiring Folk Law to represent myself (and the Sellers) that Mr. Folk would be too busy to meet with or speak with me and that he would be away on vacation during the week I was scheduled to close on this property. A detail that, had I known, would have changed my views and actions in regards to hiring them to represent me."

[207] What is <u>not</u> alleged by Ms. Rodrigue is that any of the legal work *per se* was faulty, although she did argue that he failed to obtain title insurance for her, which is a non-issue as far as I am concerned because no damages flow from that, and it appears that she would still qualify for title insurance after the fact.

[208] What it all boils down to is the allegation that she did not want to close, and received no support from her lawyer at the critical time.

[209] It would certainly be actionable for a lawyer to refuse or countermand instructions from a client not to continue with a transaction, but is that what actually happened?

[210] From where I sit, what is lacking is any reliable evidence that Ms. Rodrigue was actually prepared to terminate the transaction, and that she communicated that position to Folk Law.

[211] As I have already observed, there is a world of difference - legally speaking - between seeking to terminate a transaction, and seeking to delay a closing or enforce conditions with undertakings, holdbacks or credits.

[212] Ms. Rodrigue was in frequent email or text communication with both Mr. Snarby and with Ms. Wentzel at Folk Law. Ms. Rodrigue has not explained to my satisfaction why there are no texts or emails that even allude to her not closing. That would have made for a very different response.

[213] The notion that Ms. Rodrigue was bullied into closing exaggerates what I believe happened. There is no question that Mr. Snarby and Ms. Wentzel both knew that Ms. Rodrigue was nervous and that she had issues with the condition of the home on the date of closing, but they saw it as their task to try and satisfy Ms. Rodrigue's concerns. They were trying to make it work. Ms. Rodrigue may well have felt helpless and abandoned by her agent and lawyer, but they were talking at cross-purposes. I do not accept that they would have ignored clear instructions from Ms. Rodrigue.

[214] In retrospect, Ms. Rodrigue would have been better served by having her own agent and her own lawyer, looking out for her interests only. But I am in no position to declare that agents or lawyers should never act for both sides in real estate transactions. The practice is too entrenched, and moreover it has the virtue of saving money in the vast majority of cases.

[215] Also, Ms. Rodrigue would have been better served by having her lawyer personally meet with her and be accessible at critical times, but I am aware that standard practice in many or most offices is for paralegal staff to handle the bulk of the work in real estate transactions. I cannot say that it was professional malpractice for Mr. Folk to have delegated the work to Ms. Wentzel, or for him to have been out of the office and only available by phone on the date of closing.

[216] Again, I observe that in cases of professional negligence, there is a necessity for evidence that establishes the standard of care, unless the conduct complained of is so egregious that the court can say definitively that the standard has not been met. That is not a conclusion that I am prepared to draw.

[217] I would also observe that actionable negligence is not synonymous with professional standards or ethics. I am not suggesting that anything that occurred here was unethical, but even if it were, that would not automatically translate into civil liability.

The limitations defence

[218] While the claim itself was well in time for all of the other defendants, Ms. Rodrigue did not initially name Mr. Folk as a Defendant.

[219] The claim was initially filed with the court on July 12, 2021. On September 16, 2021 she amended the claim to add Mr. Folk as a Defendant. It is trite law that the limitation period is measured from the time a Defendant is added, and not from the date that the claim was initially filed against others.

[220] The *Limitation of Actions Act* provides as follows:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> > (a) two years from the day on which the claim is discovered; and
> >
> > (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[221] Ms. Rodrigue obviously understood that she had suffered damages, and that the matter was serious enough to warrant a proceeding as against the other Defendants, but did she know that she had a possible claim against Mr. Folk for these damages?

[222] Ms. Rodrigue argues that she did not fully appreciate that she might have a claim against Mr. Folk, and that she did not necessarily understand that she had a potential claim against any of the Defendants until she began having serious issues with the house many months after the closing. She says the limitation period should not be measured from the date of closing, July 19, 2019, but rather from some much later date when the claim was discoverable.

[223] In *Low v. Nova Scotia Police Complaints Commissioner*, 2020 NSSC 113, Justice Ann Smith of the Nova Scotia Supreme Court wrote about discoverability, citing recent Supreme Court of Canada jurisprudence:

> (a) The starting point for this analysis is the most recent statement of the Supreme Court of Canada of the discoverability doctrine in the context of limitations periods*:* *Pioneer Corporation. v. Godfrey*, 2019 SCC 42 (S.C.C.) ("Pioneer").
>
> (b) In *Pioneer*, the majority of the Court affirmed that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purpose of the running of a limitation period until the material facts on which the cause of action is based have been discovered, or ought to have been discovered by the exercise of reasonable diligence. The discoverability rule is a rule of construction to aid in the interpretation of statutory limitation periods.

[224] Applying this test, the question is when *"the material facts on which the cause of action is based have been discovered, or ought to have been discovered by the exercise of reasonable diligence."*

[225] It is possible to conclude that the limitation period in this case is not precisely the same for each Defendant. Ms. Rodrigue could have initially known that she had a claim against some Defendants, but not others, until later when more facts came to light.

[226] But I must look at the precise allegations against Mr. Folk to assess what was known, and when.

[227] Ms. Rodrigue set out in her initial claim what her complaints were. That was later added to when I ordered particulars, but this is what she initially pleaded:

> *I was forced into closing on the property in spite of my many objections and without proper legal representation, nor was I provided legal guidance as my lawyer had no knowledge I had asked to cancel/stop the sale contract due to conditions not having been met and the state of the property on the day of closing. I later found out my lawyer was away on vacation and not in the office that week and that I actually closed with their receptionist/bookkeeper, who I thought was a junior lawyer or paralegal.*

[228] I do not think it could be said that these facts (though not all necessarily accurate) were not all known on July 19, 2019, although it may be true that she did not know that Mr. Folk was on vacation. She testified that she thought he was in the office but that Ms. Wentzel would not allow her to see him. She did meet with Mr. Folk a few weeks later in August and certainly knew by then that he had been physically away on the date of closing.

[229] Her essential allegation is that she was forced or bullied into closing, and that the law office refused to follow her instructions to abort the transaction. These grievances clearly arose in her mind on the day of closing. I cannot accept an argument that they were not discovered until later.

[230] Had I found any liability on the part of Mr. Folk, I would have had to conclude that the claims were barred by the limitation period. I would have no authority to extend the period on equitable grounds, which may seem harsh but clearly reflects the will of the Legislature which has created a somewhat unforgiving limitations regime.

Conclusions

[231] I observed at the outset that Ms. Rodrigue might well feel that she was not as well-served by the professionals as she might have been. Any one of Mr. Snarby, Mr. Folk or Mr. Hall might have played a slightly different role than they did and as a result the purchase might have been avoided. But as I have found, they did not breach their legal duties to her.

[232] After having seen what can go wrong here, I am now not a fan of double agency, lawyers acting for both sides, and verbal inspection reports. But these relationships exist and I cannot say that they are *per se* improper.

Costs

[233] All of the Defendants made submissions on the matter of costs, in the event they were successful.

[234] Counsel for Mr. Cooke and Ms. Cooke-Nickerson seeks $1,071.69 for various heads of costs, including mileage for his clients to attend his office for the hearings.

[235] Mr. Hall seeks $563.28 for costs that includes preparing the written report.

[236] Counsel for Mr. Snarby seeks $347.97 for service and filing costs.

[237] Counsel for Mr. Folk advances a claim for $350.14.

[238] There is no question that had this case been brought in Supreme Court, the Claimant would be facing exposure to a crippling costs order.

[239] But this is not the Supreme Court. Matters in Small Claims are meant to be informal and inexpensive. But this case was anything but inexpensive. Those parties represented by counsel have no doubt cumulatively spent tens of thousands of dollars on legal fees that they have no prospect of recovering. All of the parties sat through probably forty hours of trial proceedings, which time might have been put to more productive use.

[240] And the effort that Ms. Rodrigue put in was enormous and, in the result, unfruitful.

[241] Everyone has already paid a huge price.

[242] Costs are discretionary. Any amount that I might order would be little more than symbolic for the recipients, but clearly a hardship for Ms. Rodrigue. I am reluctant to add insult to injury, and as such order that all parties shall bear their own costs.

ORDER

[243] In the result, the claim is dismissed against all of the Defendants, without costs.

Eric K. Slone, Adjudicator